In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 356

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LONG BEACH LOCAL NO. 1-128, PETITIONER

v.

NATIONAL LABOR RELATION BOARD, AND MACMILLAN RING-FREE OIL COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Upon a charge filed by petitioner Union,[1] the Board found, after an administrative hearing, that the Company had violated Section 8(a)(5) and (1) of the National Labor Relations Act, by refusing to bargain in good faith with the Union, and entered an appropriate remedial order. Pet. App. 18-104. The bar-

[1] The Union intervened in the court below.

gaining negotiations spanned a four-year period, between June 1961 and April 1965. But since the unfair labor practice charge was not filed until November 10, 1964, and since Section 10(b) of the Act sets a six-month period of limitations,[2] the Board based its unfair labor practice finding on the events which occurred on and after May 10, 1964, and utilized the prior events merely to "shed light on the true character of matters occurring within the limitations period." Pet. App. 30, quoting from *Local 1424, Int'l Assoc. of Machinists* v. *National Labor Relations Board*, 362 U.S. 411, 416.

The court of appeals denied enforcement of the pertinent part of the Board's order. Although recognizing that "evidence of events occurring more than six months before the filing of a charge may be used to 'shed light' upon events taking place within the six-month period," the court concluded that the policy underlying Section 10(b) would be unduly impaired unless "the evidence of a violation drawn from within that period [is] reasonably substantial in its own right." Pet. App. 13-14.[3] Concluding that the events

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[2] Section 10(b), in relevant part, reads:

> *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

[3] The Court added (Pet. App. 14, n. 6):

> We use the term "substantial" merely in the sense of "significant" or "not inconsiderable," and do not of course intend to indicate that the evidence drawn from within

which occurred within the limitations period were not "substantial" (Pet. App. 3-7), the court held that the Board's finding of a refusal to bargain in good faith was barred by Section 10(b) of the Act.

While the Board agrees with petitioner that the court of appeals erred in holding Section 10(b) a bar to the finding of an unfair labor practice, the Board has not undertaken to seek certiorari. As this Court's opinion in *Local 1424, supra*, shows (see 362 U.S. at 416-422), there is often a delicate line, which necessarily turns on the facts of the particular case, between the use of events prior to the 10(b) period merely to shed light on subsequent events which may in themselves constitute unfair labor practices, and the use of time-barred events "to cloak with illegality that which was otherwise lawful" (*id.*, at 417). Moreover, the Board's decision in this case does not fully explicate the basis for its conclusion that 10(b) was not a bar, since the Board adopted the trial examiner's decision which simply stated that events prior to the limitations period were being "utilized to shed light on the true character of matters occurring within the limitation period" (Pet. App. 30). For these reasons, the Board does not believe that the instant case is an appropriate one for review by this Court.

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the limitations period must of itself be sufficient to sustain an unfair labor practice finding in enforcement proceedings.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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